Calendar No. 216

99TH CONGRESS
2d Session

SENATE

REPORT
99-504

THE CHILD ABUSE VICTIMS' RIGHTS ACT OF 1986

SEPTEMBER 29 (legislative day, SEPTEMBER 24), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 985]

The Committee on the Judiciary, to which was referred the bill resolution (S. 985) to protect the rights and victims of child exploitation, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

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I. PURPOSE AND HISTORY OF THE BILL

The purpose of S. 985, the Child Abuse Victims' Rights Act, introduced by Senator Charles Grassley (R-Iowa), is to fill in gaps that remain in current federal and state law regarding the sexual exploitation of children.

In 1978, Congress responded to this Committee's findings that child pornography had become a highly organized, multi-million dollar, nationwide industry [1] by enacting the Protection of Children Against Exploitation Act.[2]

[1] S. Rep. No. 95-438, 95th Cong., 1st sess. 5 (1978).
[2] 18 U.S.C. sections 2251-2253 (1978).

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The Act criminalized the production and distribution of certain types of child pornography. However, the Act was severely limited in a number of ways, including language requiring the materials to be legally obscene,[3] requiring a pecuniary profit motive [4] and defining "minors" as children under the age of sixteen.[5] Consequently, the Act did not reach child pornography that involved non-obscene sexually explicit depictions of children, or that was used for personal gratification rather than financial gain or that involved minors who were at least sixteen years old.

In 1982, the Supreme Court ruled in the landmark case of *New York* v. *Feber* [6] that sexually explicit visual depictions of children do not have to be legally obscene under *Miller* v. *Calironai* [7] to be prescribed by state or federal law. Consequently, Congress aggressively responded to *Ferber* by passing the Child Protection Act of 1984,[8] which deleted the obscenity requirements.[9]

In addition, the Child Protection Act eliminated the pecuniary profit requirement,[10] changed the definition of "minor" to include persons under the age of eighteen,[11] and made other substantive changes as well.[12]

Although the 1984 modifications have increased the Justice Department's ability to prosecute creators or purveyors of child pornography,[13] there remain gaps within current law that if filled, would greatly enhance the victim and government's arsenal in the war against the child pornography menace.

Other inadequacies remain within current law concerning penalties, lack of adequate victim compensation, confusion in courtroom proceedings, and inadequate provisions for the prosecution of those who control child pornography. In response to such inadequacies, Senator Grassley introduced S. 985, a bill to further protect victims of child exploitation, on April 24, 1985.[14] The bill was referred to

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[3] 18 U.S.C. section 2252 (a)(2) (1978).
[4] 18 U.S.C. section 2253 (3) (1978).
[5] 18 U.S.C. section 2253 (1) (1978).
[6] 458 U.S. 747 (1982).
[7] 413 U.S. 15 (1983).
[8] 18 U.S.C. sections 2251-2255 (1984) (amending 18 U.S.C. sections 2251-2253 (1978).
[9] Pub. L. No. 98-292, section 4(3) (Amending 18 U.S.C. section 2252 (1978)). Three more minor changes were also made in this section. The scope of the law was changed from "visual or print medium" to "visual depictions." 18 U.S.C. section 2255 (1984). The phrase "lewd exhibition of the genitals" in the definition of "sexually explicit conduct" was changed by substituting "lascivious" for "lewd". 18 U.S.C. section 2255(2)(E)(1984). Finally, the qualification that sado-masochistic abuse was only prohibited if done for the purposes of sexual stimulation was removed. 18 U.S.C. section 2255(2)(D) (1984).
[10] Id. at sections 4(2), 5(a)(5) (amending 18 U.S.C. section 2252 (1978)). Congress was presented with evidence that a large percentage of child pornography is used personally and not for profit, thus precluding prosecution of a large proportion of cases. See, Exploited and Missing Children: Hearing Before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary, 97th Cong., 2d sess. 39 (1982) (Statement by Dana E. Caro, Inspector-Deputy Assist. Dir. Criminal Investigative Div., F.B.I.) ("largest percentage of child pornography available in the United States today was originally produced for . . . self-gratification . . . and was not necessarily produced for commercial purposes." and F.B.I. enforcement is "seriously impaired" by the pecuniary interest requirement).
[11] Id. at section 5(a)(1) (amending 18 U.S.C. section 2253 (1978).
[12] The act also criminalized the reproduction of child pornography for distribution in interstate or foreign commerce, created criminal and civil forfeiture provisions against property or profits related to child pornography, and authorized court-approved wiretapping in child pornography cases. Id. at sections 4(7), 6, 8 (1984).
[13] Hearing on S. 985, The Child Abuse Victims' Rights Act of 1985, Before the Subcom. on Juvenile Justice of the Senate Comm. on the Judiciary, 99th Cong., 1st sess. 20 (1985) (testimony of Victoria Toensing, Deputy Asst. Atty. General, Crim. Div.). [hereinafter cited as Senate Hearing].
[14] 131 Cong. Rec. S4689-91 (1985).

the Committee on the Judiciary where it was referred jointly to the Subcommittee on Juvenile Justice and the Subcommittee on Criminal Law. The Subcommittee on Juvenile Justice held a hearing on September 24, 1985.[15] The Juvenile Justice Subcommittee unanimously polled out a substitute amendment to the Full Committee on June 25, 1986. The substitute amendment makes child pornography an offense under the Racketeer Influenced Corrupt Organizations Act (RICO);[16] creates a civil personal injury remedy for child pornography victims; authorizes an Attorney General report to model recommendations to assist child victim witnesses in courtroom proceedings; and increases the minimum sentence for creators or purveyors of child pornography who are repeat offenders.

The approved substitute amendment also included amendments offered by Senator Howard Metzenbaum (D-Ohio), that created a statute of limitations, and set minimum damages on the civil personal injury remedy.

By unanimous consent, the Full Committee then approved S. 985 as amended with an additional committee amendment, and ordered it to be reported on July 17, 1986.

II. The Provisions of S. 985 as Reported

Prior to reporting S. 985, the Judiciary Committee fully and carefully considered the need for additional legislation regarding child pornography.

At the hearing held on September 24, 1985, the Subcommittee on Juvenile Justice took testimony from witnesses representing the Administration, the American Bar Association, and child advocacy groups.

There was a consensus among the witnesses that child pronography should be included as a racketeering offense under the Racketeer Influenced Corrupt Organizations Act (RICO).[17] Proponents of the bill also argued for the need of a personal injury remedy under civil RICO[18] for child exploitation victims,[19] an Attorney General report on model recommendations to assist child-victim witnesses in courtroom proceedings,[20] updating F.B.I. crime files,[21] and increasing minimum penalties for creators or purveyors of child pornography who are repeat offenders.[22]

However, due to Department of Justice testimony in opposition to various provisions in the original bill,[23] the Subcommittee de-

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[15] See, S. Hrg., supra note 13.

[16] 18 U.S.C. sections 1961-1968 (1984). RICO imposes criminal sanctions against participation in an "enterprise" which "affects" interstate commerce and which involves or is predicated upon a "pattern" or "racketeering activity" involving specified crimes.

[17] See S. Hrg., Supra n. 13, testimony of Senator Paula Hawkins (R-FL) at 12; statement of Rep. Jack Kemp (R-NY) at 15; testimony of Victoria Toensing, Dep. Assist. Atty. General, Crim. Div. at 16; testimony of Gregory Loken, Exec. Director, Institute for Youth Advocacy at 69-74.

[18] 18 U.S.C. section 1964(c) (1984). Currently, a plaintiff can only sue for damages to "business or property", and not for personal damages.

[19] See S. Hrg., Supra n. 13, testimony of Gregory Loken at 70-74.

[20] Id. at 95-97, 131, testimony of Catherine Anderson and Howard Davidson, American Bar Association.

[21] Id. at 44-45, 66-68, testimony of John Walsh, Chairman of the Adam Walsh Resource Center.

[22] Id. at 48.

[23] The Justice Department opposed section 3 of the original bill which added a personal damage element to civil RICO. The Department also opposed sections 5 and 6 of the original bill

Continued

veloped a compromise substitute amendment that was unanimously approved. Consequently, in passing the substitute version, the Subcommittee members believed that all of the Department's concerns were adequately met, and the Committee approved the Subcommittee's substitute amendment on these matters.

Therefore, in approving S. 985 as amended in Subcommittee, along with a Full Committee amendment to section 4 of the amended bill,[24] it is the Committee's intent to include the child pornography offenses [25] under RICO; to create a federal civil remedy for victims of child pornography; to provide for an Attorney General report on model recommendations for child-victim witnesses in the courtroom; and to increase minimum penalties for creators or purveyors of child pornography who are repeat offenders from two years to five years.

The RICO statute is a powerful weapon against organized criminal activity, which already includes as predicate offenses the transporting of minors for the purpose of prostitution or other "prohibited sexual conduct" and obscenity prohibitions.[26] Unfortunately, however, child pornography that may not be legally obscene, although illegal under the Child Protection Act of 1984, is not included under RICO. S. 985 remedies this situation.

In addition, under current law, only producers, distributors or receivers of child pornography can be prosecuted. Consequently, those who actually control child pornography, such as the "masterminds" or "financiers," cannot be reached. Furthermore, creators or purveyors of child pornography frequently misuse their roles in legitimate youth organizations,[27] and child pornography has increasingly become a commercial enterprise.[28] Therefore, child pornography offenses, as envisioned in S. 985, are particularly appropriate for prosecution under RICO, which targets the use of both criminal and legitimate organizations for criminal activity.[29]

As Gregory Loken, Executive Director of the Institute for Youth Advocacy and a noted author in the field of child exploitation testified:

> Because child pornography operations can be highly complex, a prohibition which reaches only those who produce, receive or distribute such material may fail to touch those who mastermind, finance and promote such

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concerning mandatory sentences for child kidnappers and repeat offenders and a potential death sentence if a child was killed during a kidnapping. The Department did not oppose a death penalty provision per se, but supported broader legislation which would cover many serious offenses, instead of just one. The Department also opposed the original sections 7, 8 and 9 of the bill, regarding the Attorney General report, the F.B.I. crime files and an additional seat on the Advisory Board on Missing Children. S.Hrg., supra n.13 at 16–19, 36 (testimony of Victoria Toensing).

[24] The Committee believed that the Subcommittee version of section 4 of S. 985 regarding the term "person" was too broad and could have been interpreted to include those who did not suffer direct harm. By unanimous consent, the Committee approved an amendment narrowing the scope of the section to apply only to a "victim" of child pornography, which under 18 U.S.C. sections 2251 and 2252 only includes minors who are victims.

[25] 18 U.S.C. section 2251, 2252 (1984).

[26] 18 U.S.C. section 1961(1)(A) and (B) (1984).

[27] S. O'Brien, Child Pornography, at 13–14, 79–81 (1983).

[28] Id. at 7–8. See also, *United States* v. *Langford*, 688 F.2d 1088, 1097 (7th Cir. 1982) where the defendant as "part of a commercial chain of child pornography," and who "requested a special price [from the photography laboratory] due to his volume."

[29] *United States* v. *Turkette*, 452 U.S. 576, 591–593 (1981).

> operations. The concept of "enterprise" in RICO is a very broad one, and its target is indeed the "big fish" of criminal operations who are so difficult to catch in traditionally defined criminal acts. Harmonizing that aspect of RICO with the Congressional assault on child pornography could substantially deter organized crime and other potential financiers form involvement in sexual exploitation.[30]

Application or RICO will provide a further deterrent effect because under the statute, a defendent can be imprisoned for up to twenty years,[31] whereas under the child pornography statutes, a defendant can be imprisoned for only up to ten years.[32]

In addition, other important advantages of applying RICO to child pornography include the authorization under civil RICO [33] of civil suits by the federal government and the availability of injunctive relief to prevent or teminate the interstate distribution of child pornography.

Consequently, since a lower standard of proof would be required under civil RICO,[34] the federal government could bring a civil RICO action against a perspetrator without having to prove the allegations beyond a reasonable doubt. In addition, instead of forcing the government to seek injunctive relief in every state where the child pornography is disseminated, prosecutors can prevent distribution by obtaining relief in one federal court under civil RICO.

Therefore, the Committee believes it is necessary to increase penalties for organized child pornography and to authorize the prosecution of those who bankroll or control child pornography, thereby putting the prosecution of child pornography crimes on an equal footing with the prosecution of similarly situated crimes, and creating a deterrent to future child exploitation. These goals are accomplished by including the child pornography statutes as predicate offenses under the RICO statute.

In addition, child pornography victims have no real vehicle for adequate victim compensation. Under the Victims of Crime Act of 1984,[35] compensation is generally limited to victims of state crimes. Federal crime victims can only obtain money for court-related services, and as with the Victim and Witness Protection Act,[36] compensation is limited to expenses resulting from bodily injury, including both out-of-pocket and medical expenses. Consequently, child pornography victims are not adequately compensated for the substantial mental or emotional harms suffered as a result of being victimized.

Moreover, adequate state provisions for victim compensation do not exist,[37] and the Committee is unaware of any successful civil suit in state court by a child victim of sexual exploitation.

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[30] S. Hrg., supra n.13 at 85 (statement of Gregory Loken citing *United States* v. *Stratton*, 649 F.2d 1066 (5th Cir. 1981) and Strafer, et.al., Civil RICO in the Public Interest: "Everybody's Darling," 19 Am. Crim.L.Rev. 656, 682 (1982)).

[31] 18 U.S.C. section 1963(a) (1984).

[32] 18 U.S.C. sections 2251(c), 2252(b) (1984).

[33] 18 U.S.C. Section 1964 (1984).

[34] *Sedima, S.P.R.L.* v. *Imrex Co.* 105 S.Ct. 3275. 3275, 3282-83 (1985).

[35] Public Law 98-473, title II, ch. XIV. (1984).

[36] 18 U.S.C. section 3579 (1984).

[37] S. Hrg., supra n. 13 at 87-89, testimony of Gregory Loken.

Therefore, the Committee believes the implementation of a federal civil remedy, as reflected in section 4 of the bill, which allows treble damages, court costs and attorney fees against child pornographers will greatly enhance the ability of child pornography victims to more closely achieve adequate compensation for their injuries. In light of testimony at the hearing on S. 985 which indicated that including a personal injury remedy under civil RICO could lead to further confusion regarding the intent and scope of civil RICO,[38] the Committee believes it is more appropriate to implement a new personal injury remedy for child pornography victims outside of civil RICO. This bill would create such a remedy in Chapter 110 of Title 10. This approach will allay concerns about detrimentally affecting civil RICO while at the same time achieving the goal of adequate victim compensation. The Committee further believes that damages for a victim should be deemed to be a minimum of $50,000. In addition, under the statute of limitation provisions of the bill, a person will have 6 years to pursue his/her remedies once a right of action accrues. In the case of a person under a legal disability, a suit will be barred if it is commenced more than three years after the disability is terminated.

In addition, there is currently a great deal of confusion across the country regarding various court-related proceedings and procedures for child victims witnesses, including increasing awareness and sensitivity to the needs of children in our criminal justice system as well as the need to protect the constitutional rights of all those involved.[39] In order to provide assistance to the states, as well as to the federal government, the Committee believes it is necessary for the Attorneys General of the United States to issue model recommendations that will serve as constitutional guidelines on these various new developments in child exploitation-related court procedures. The Committee notes that the Attorneys General's own Advisory Board on Missing Children advocates the creation of such model recommendations.[40]

The Committee, therefore, believes that the Department of Justice should compile studies and recommendations in this area, such as the American Bar Association guidelines, studies by the National District Attorney Association and the National Association of Attorney General, publications by the Center for Child Advocacy and Protection, and the Department's existing and ongoing studies, as well as others, and then issue a reasonable report on model recommendations at a minimal cost from no additional authorized funds.

Finally, the Committee believes the current two year minimum sentence [41] for creators or purveyors of child pornography who are repeat offenders is inadequate. Consequently, the Committee believes the minimum sentence for repeat offenders should be increased from two years to five years.

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[38] Id. at 16–17, testimony of Victoria Toensing.
[39] Id. at 132, testimony of Catherine Anderson.
[40] America's Missing and Exploited Children: Their Safety and Their Future, Report and Recommendation of the U.S. Attorney General's Advisory Board on Missing Children, 24 (March 1986). This report recommends that "[m]odel federal and state legislation and court rules should be developled to ensure that the child victim is not further victimized by the justice system."
[41] 18 U.S.C. sections 2251(c), 2252(b).

III. Section-by-Section Analysis

S. 985, as reported by the Judiciary Committee makes a number of changes in title 18 of the United States Code.

Section 3 amends section 1961(1)(B) of the Racketeer Influenced Corrupt Organizations Act to include sections 2251 and 2252 (relating to sexual exploitation of children) as predicate offenses.

Section 4(a) amends chapter 110 of part I by re-designating section 2255 as section 2256 and creating a new section 2255 which is a civil remedy for personal injuries and authorizes a victim of child pornography (sections 2251 and 2252) to sue in federal court for treble damages, court costs and attorney fees. A victim's damages are deemed to be no less than $50,000 in value. In addition, a statute of limitations is imposed for six years from the date the right of action accrues, or three years after a legal disability terminates.

Section 4(b) amends chapter 110 of part I by re-designating the headings for sections 2255 and 2256.

Section 5(a) amends section 2251(c) by increasing the minimum sentence for recidivist producers of child pornography from two years to five years.

Section 5(b) amends section 2252(b) by increasing the minimum sentence for recidivist distributors and receivers of child pornography from two years to five years.

Section 6(a) directs the Attorney General to submit a report to Congress detailing model recommedations to facilitate the participation of child-victim witnesses in cases involving child abuse and sexual exploitation.

Section 6(b) specifically lists issues to be considered in the Attorney General Report. However, the Attorney General is not limited to considering only the issues specifically listed.

IV. Agency Views

On September 24, 1985, Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, provided testimony on S. 985.

The Department strongly endorsed the inclusion of child pornography as a predicate offense under the Racketeer Influenced Corrupt Organization Act, (RICO).

In addition, concerns were raised about other provisions of the bill, including the modification of sentences, adding a personal injury remedy to civil RICO, modifying the F.B.I. crime files, adding members to the Advisory Board on Missing Children, and an Attorney General report.

However, through the Committee process, these concerns have been substantially met.

V. Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 26, 1986.

Hon. Storm Thurmond,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 985, the Child Abuse Victims' Rights Act of 1986, as reproted by the Senate Committee on the Judiciary on August 15, 1986. Enactment of this legislation would result in costs to the federal government of about $100,000 in fiscal year 1987. This estimate supersedes our cost estimate dated August 18, 1986.

S. 985 would establish that any minor who is a victim of pornography-related exploitation could sue in federal court and receive a minimum damage award of $50,000, and would lengthen the minimum sentence for repeat offenders from two to five years. Because the number of repeat offenders is low in any given year, we expect this provision to result in no significant costs to the government.

The bill would also mandate that the Department of Justice (DOJ) conduct a study of courtroom and investigative procedures that would make children more willing to participate in investigations and criminal proceedings related to child abuse and sexual exploitation. According to information supplied by the DOJ and the National District Attorney's Association, similar studies for state and local courts and prosecutors could be used as a basis for this study. Nevertheless, some additional work would be required. We estimate that completion of this study in one year would cost about $100,000. Assuming enactment around October 1, 1986, these costs would be incurred in fiscal year 1987.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish any further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Edward Gramlich
(For Rudolph G. Penner).

VI. Regulatory Impact Statement

In compliance with paragraph 11(b) rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concluded that this bill will not have any regulatory impact.

VII. Action by the Committee

On July 17, 1986, with a quorum present, by unanimous consent, the Committee on the Judiciary ordered the bill, as amended in subcommittee, with an addtional Committee amendment, favorably reported.

VIII. Changes in Existing Law

In compliance with paragraph (12) of rule XXVI of the Standing rules of the Senate, changes in existing law made by S. 985 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

United States Code

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definition

As used in this chapter—

(1) "racketeering activity" means (A)

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(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), *sections 2251 and 2252 (relating to sexual exploitation of children),* sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C)

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CHAPTER 110—SEXUAL EXPLOITATIONS OF CHILDREN

Sec.

2251. Sexual exploitation of children.

2252. Certain activities relating to material involving the sexual exploitation of minors.

* * * * * * *

2255. Civil remedy for personal injuries.
[2255] *2256.* Definitions for chapter.

§ 2251. Sexual exploitation of children

* * * * * * *

(c) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000 [or imprisoned not less than two years] *or imprisoned not less than five years* nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

* * * * * * *

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

* * * * * * *

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, [or imprisoned not less than two years] *or imprisoned not less than five years* nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

* * * * * * *

§ 2255. Civil remedy for personal injuries

(a) Any minor who is victim of a violation of Section 2251 or 2252 of this title may sue in any appropriate United States district court and shall recover threefold the damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value.

(b) Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

§ [2255] *2256.* Definitions for chapter

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99TH CONGRESS
2d Session

SENATE

REPORT
99-535

EXEMPTING CERTAIN ACTIVITIES FROM PROVISIONS OF THE ANTITRUST LAWS

OCTOBER 8 (legislative day, OCTOBER 6), 1986.—Ordered to be printed

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2323]

The Committee on the Judiciary, to which was referred the bill (S. 2323) to exempt certain activities from provisions of the antitrust laws, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended do pass.

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Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) actions specified in section 2 shall be exempt from certain provisions of the antitrust laws of the United States.

(b) For purposes of this Act—

(1) "antitrust laws" has the meaning given such term in the first section of the Clayton Act, and the Federal Trade Commission Act;

(2) "person in the television industry" means a person who is the chief executive officer of a television network or of an entity which produces programming

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for television distribution, including theatrical motion pictures, and the presidents of the National Cable Television Association, the Association of Independent Television Stations, Inc., the National Association of Broadcasters and the Motion Picture Association of America, or their designees; and

(3) "telecast" means any program broadcast by a broadcast station or transmitted by a cable system.

SEC. 2. The antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry pursuant to the development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

SEC. 3. (a) The exemption provided in section 2 shall not apply to any joint understanding, action, or agreement which results in a boycott of any other person in such industry.

(b) The exemption provided in section 2 shall terminate on the date 36 months after the date of enactment of this Act.

I. PURPOSE

As amended by the Committee, S. 2323 grants an exemption from the antitrust laws to the television industry that is carefully limited both in time and scope. It permits certain parties in the industry to act jointly during a period of 36 months from the date the bill is enacted for the narrow purpose of developing and disseminating voluntary guidelines designed to alleviate the negative effects of televised violence on children and adults.

The existence of such harmful effects is well-documented. Among others, the National Institute for Mental Health, the Surgeon General, the American Psychological Association, the American Psychiatric Association and the American Academy of Pediatrics have all found that television violence is linked to negative and aggressive behavior. The same conclusions were presented by witnesses at the Committee's hearing on S. 2323 and during an oversight hearing on the subject of televised violence held by the Juvenile Justice Subcommittee in 1984.

Industry spokespersons state that the television industry's uncertainty about liability under the antitrust laws prevents it from undertaking the beneficial joint activity authorized by this legislation. S. 2323 removes this federally-placed obstacle and allows the industry to use its considerable collective resources to address a serious problem. It simply grants the immunity from antitrust challenge that the Committee has determined is appropriate for concerted action in this area.

In order that the Committee could fully evaluate the First Amendment aspects of S. 2323 and in response to questions raised by Senators Mathias and Kennedy during the Committee's consideration of the bill, Senator Simon asked sixteen constitutional scholars to comment on the constitutionality of S. 2323. This draft did not contain the 3-year sunset provision, but was otherwise identical to the amended version of the bill reported by the Committee.

Nine scholars responded. Seven of these—Messrs. Berger, Gertz, Gewirtz, Griswold, Kurland, Strickland and Underwood—stated that the bill was clearly constitutional. Messrs. Stone and Tribe said the bill appeared to pass constitutional musters, but expressed concern about the ways in which Congress might use such exemptions in the future to induce broadcasters to shape their messages along favored lines. Both of these commentators, however, agreed

that there are strong arguments in favor of this particular exemption.

The Committee notes that the responses of the scholars contacted overwhelmingly affirm the constitutionality of S. 2323 and strongly support its underlying purpose. These comments are reproduced in Section III.C. of this report.

While the Committee is mindful of the serious First Amendment concerns that could be raised by any attempt on the part of the federal government to set limits on the content of television programming, it believes that S. 2323 presents no such threat to freedom of speech or artistic expression. It leaves responsibility for the regulation of televised violence where it rests today—in the individual good judgment and public-mindedness of broadcasters, cable operators and producers.

This bill imposes no governmental guidelines or regulations on the parties covered by the exemption. They would remain free to accept or reject any guidelines which might result from the joint action permitted by S. 2323. The only sanction would be that of public disapproval.

The Committee thus approves S. 2323 as a narrowly-drawn exemption from the antitrust laws which permits and encourages broadcasters, cable operators and producers to regulate themselves in pursuit of a significant and necessary public purpose. In the Committee's view, the bill would accomplish this goal without infringing on the protections afforded by the First Amendment.

II. TEXT OF SENATE BILL S. 2323

A BILL To exempt certain activities from provisions of the antitrust laws

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) actions specified in section 2 shall be exempt from certain provisions of the antitrust laws of the United States.

(b) For purposes of this Act—

(1) "antitrust laws" has the meaning given such term in the first section of the Clayton Act, and the Federal Trade Commission Act;

(2) "person in the television industry" means a person who is the chief executive officer of a television network or of an entity which produces programming for television distribution, including theatrical motion pictures, and the presidents of the National Cable Television Association, the Association of Independent Television Stations, Inc., the National Association of Broadcasters and the Motion Picture Association of America, or their designees; and

(3) "telecast" means any program broadcast by a broadcast station or transmitted by a cable system.

SEC. 2. The antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry pursuant to the development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

SEC. 3. (a) The exemption provided in section 2 shall not apply to any joint understanding, action, or agreement which results in a boycott of any other person in such industry.

(b) The exemption provided in section 2 shall terminate on the date 36 months after the date of enactment of this Act.

III. NEED FOR LEGISLATION

A. The need for an antitrust exemption

A chief source of the industry's reluctance to undertake the joint action authorized by S. 2323 is industry concern about potential antitrust liability. This concern arises from a complaint filed by the Justice Department against the National Association of Broadcasters ("NAB") in 1979. See *United States* v. *National Association of Broadcasters,* 536 F.Supp. 149 (D.D.C. 1982). In this action, the Department alleged that the NAB violated section 1 of the Sherman Act, 15 U.S.C. Section 1, by its adoption and enforcement of certain advertising standards that regulated television advertising. These standards were part of the NAB's "Television Code," which was subscribed to by most of the nation's television stations. While subscription to the Code was voluntary, the NAB administered a comprehensive monitoring and enforcement program through its "Code Authority" punishing violators of the Code by prohibiting them from displaying the NAB Seal of Good Practice.

The challenged provisions of the Code imposed limitations on the number of minutes per hour a network or station could allocate to commercials, the number of commercials that could be broadcast per hour of television time and the number of products which could be advertised on certain types of commercials (which the court called the "multiple product standards"). On motions for summary judgment by both parties, the court found the "multiple product standard" to be a per se violation of the Sherman Act because, inter alia, it was a horizontal agreement among competitors to restrict the output of television time available for commercials. The parties subsequently entered into a consent decree whereby NAB agreed to stop disseminating or enforcing all of the three challenged standards. The final judgment entered pursuant to the decree remains in affect for ten years from the date of entry. Since entering into the consent decree, NAB has completely discontinued the use of its Television Code, even though only relatively small parts of it were declared invalid.

As the *NAB* case demonstrates, collective self-regulatory measures undertaken by competitors can be regarded under antitrust law as unreasonable horizontal restraints of trade. Furthermore, under current antitrust laws, any social benefits created by such collective efforts but not related to competition (such as a reduction in the level of violence) would not be cognizable as a legal justification for anticompetitive conduct. See *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978). Therefore, there are grounds for concern among members of the television industry who might otherwise engage in collective discussions regarding the effects of violence in broadcasts.

The Committee appreciates that prudent antitrust counsel, in light of the *NAB* case, might caution a client in the television in-

dustry against participation in the joint activity authorized by S. 2323. In approving S. 2323, the Committee has determined that the actions permitted by the exemption further an important social purpose—the alleviation of the harmful effects, particularly on children, of televised violence—to which an agreement among television industry competitors may be ancillary.

The exemption does not authorize the creation of an enforcement authority similar to the NAB's Code Authority. It does not permit the implementation of any joint sanction or of a boycott by any of the parties covered by the exemption. It simply permits the development and dissemination of voluntary guidelines which members of the industry may, in their individual judgments, elect to follow. It is designed to facilitate a broad consensus in the industry on the subject of televised violence.

While S. 2323 was pending in the Committee, the Justice Department raised a question about language in the original bill which would exclude from the coverage of the antitrust exemption any actions that are "intended to result in a boycott." The Committee subsequently amended the bill, so that the exclusion does not turn on the element of intent. Instead, the exclusion from the antitrust immunity now applies to "any joint understanding, action or agreement which results in a boycott." The Committee makes it clear that the narrow antitrust exemption conferred by this bill does not apply to any boycott engaged in by any of the parties covered by the exemption.

B. The harmful effects of televised violence

In the early 1950s, only 50 percent of American households contained television. By 1954, the Senate Subcommittee on Juvenile Delinquency had conducted the first examination of the possible harmful effects of television violence. During the ensuing 32 years, numerous hearings and studies on televised violence have been written from every prespective. Psychologists, sociologists, industry representatives and government agencies—among others—produced volumes of data on the subject. An overwhelming majority of these studies suggest a causal connection between violence on television and negative attitudes and behavior.

A 1972 report by the National Institute of Mental Health ("NIMH"), conducted for the Surgeon General's Scientific Advisory Committee, concluded that a link appeared to exist between violence on television and aggressive behavior. The report also stated that additional studies were required. In 1982, NIMH published an analysis of studies of television violence conducted after its 1972 Report. In testimony before the Juvenile Justice Subcommittee on the 1982 NIMH study, a spokeman for NIMN confirmed that:

> A sizable number of studies did support the inference that there was a casual connection between the viewing of televised violence and later aggressive behavior.

The U.S. Attorney General's 1984 Task Force on Family Violence report concluded that:

> Evidence is becoming overwhelming that, just as witnessing violence in the home may contribute to normal

> adults and children learning and acting out violent behavior, violence on television . . . may contribute to the same result.

The American Psychological Association passed a resolution in February, 1986, which stated,

> The conclusion drawn on the basis of 25 years of research and the sizable number of experimental and field investigations is that viewing televised violence may lead to increases in aggressive attitudes, values, and behavior, particularly in children.

The American Psychiatric Association and the American Medical Association both passed resolutions which declare that television violence is a risk factor which threatens the health and welfare of young Americans.

The American Academy of Pediatrics' Policy Statement on Children, Adolescents and Television found that:

> Repeated exposure to televised violence promotes a proclivity to violence and a passive response to its practice. (1985)

Jerome and Dorothy Singer of Yale University found that 3- and 4-year-old children who are heavy viewers of violent programs also engaged in unwarranted aggressive behavior while playing during free time in a day care setting. ("Television Viewing and Aggressive Behavior in Preschool Children: A Field Study." Forensic Psychology and Psychiatry, 347, 289–303, 1980.)

George Gerbner of the University of Pennsylvania, in an ongoing study, has found that extensive exposure to television leads viewers to become more distrustful. (Gerbner, Bross, Signiorelli, "Television's Mean World: Violence Profile No. 14–15," Annenberg School of Communications, 1986.)

According to researchers R. Drabman and M. Thomas, children who watch television may become more tolerant of aggressive behavior and perceive such behavior as acceptable. "(Does Media Violence Increase Children's Toleration of Real-life Aggression?" Developmental Psychology, 10, 418–421, 1974.)

The Committee agrees with the growing body of evidence concluding that television violence contributes to aggressive and destructive behavior. Thus, the Committee finds that a demonstrable need exists for the joint activity permitted by S. 2323.

C. Constitutionality of S. 2323

During Committee consideration of S. 2323, questions were raised concerning the constitutional implications of this Congressional action. The Committee included in this report a memorandum prepared by the Congressional Research Service at the request of Senator Simon and comments from nine constitutional scholars concerning the First Amendment aspects of S. 2323. These materials both address the questions raised during the Committee's mark-up of the bill and embody a full discussion of this issue. The Committee is confident that S. 2323 is clearly constitutional.

The memorandum and comments are reproduced below:

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, August 12, 1986.

To: Honorable Paul Simon.
From: American Law Division.
Subject: Constitutionality Of Bill Exempting Broadcasters From Antitrust Law Coverage In Order To Permit Them To Promulgate Antiviolence Rules.
Attention: Chris Dunn.

This is in response to your inquiry for a brief consideration of the constitutional issues raised by your bill to provide an antitrust exemption for broadcasters entering into joint action to promulgate and enforce rules that would operate to reduce violence depicted in broadcast television programs. The primary constitutional issue raised by any governmentally provided restraint of expression is its permissibility under the First Amendment, but with respect to this proposal there preliminarily arises the question whether the Constitution would apply to the broadcast rules at all.

I

For the most part, rights secured by the Constitution are protected only against infringement by the government itself. Situations do occur in which the actions of private parties will be considered to be "state action" for constitutional purposes, such as, for example, when a private party conspires with a public official, *Dennis* v. *Sparks,* 449 U.S. 24 (1980), or when a public official carries out an action on behalf of a private party. *Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922 (1982). For a lengthy period of time, the Court closely examined the relationship of private action to public action and found state action grounded often in the context of a close relationship. E.g., *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715 (1961). That period has passed, however, and the Court now demands a strong showing of governmental responsibility for the private action before the Constitution will be held to reach it. (Although the cases arise mostly in the context of the States, the standard is the same if the Federal Government is the "official actor." *CBS* v. *DNC,* 412 U.S. 94 (1973)).

Here, Congress would grant an antitrust exemption, so that the broadcasters could cooperate with each other in promulgating and implementing standards for reducing television violence. The action complained of as raising constitutional questions is not the congressional action conferring the antitrust exemption but rather the actions taken by the broadcasters in limiting expression. Does the conduct of the broadcasters constitute "state action"? The legislation is permissive, not mandatory. It encourages, certainly, but the critical question is whether the degree of encouragement is sufficient to make the private action state action.

One challenging the conduct of a private party allegedly taken pursuant to statute most establish not only that the private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State." *Flagg Bros.* v. *Brooks,* 436 U.S. 149, 156 (1978). That is, the existence of some form of statutory authorization, standing alone, is not sufficient. "[O]ur prece-

dents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky,* 457 U.S. 991, 1004 (1982).

This language has been applied much more strictly than it would appear to require on its face. In *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), the termination-of-service policies of a utility were found not attributable to the State merely because the State required the utility to submit for approval its tariff schedules, including the termination policies. Although the State had generally approved the policies, it "had not put its own weight on the side of the proposed practice by ordering it." Id., 357. In *Flagg Bros.* v. *Brooks,* supra, New York had adopted the Uniform Commerical Code, which, among other things, had set out in some detail the circumstances under which one having a warehouseman's lien could take and sell the debtor's property in his possession in order to satisfy the lien. Sale was by private action, classic self-help. The Court held that the private sale could not be considered state action on the theory that the State had authorized it and encouraged it by enacting the UCC. The State had done no more than tell private parties that if they engaged in self-help within the confines of the statute the State would not interfere. "Our cases state 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.' [Citing *Adickes* v. *Kress & Co.,* 398 U.S. 144, 170 (1970)]. This Court, however, has never held that a State's mere acquiesence in a private action converts that action into that of the State." Id., 164.

In *Blum* v. *Yaretsky,* supra, patients in a private nursing home sued to challenge their transfer from one facility to another, resulting in lower Medicaid payments. They claimed they were entitled to due process hearings before being transferred. Federal regulations required each nursing home to establish a utilization review committee of physicians to periodically assess whether each patient was receiving the appropriate level of care and to transfer any patient determined not to be receiving the appropriate level to another facility. The regulations provided for the imposition of a variety of financial penalties for health care providers who furnished services in excess of a patient's needs, that is, who did not transfer patients whose continued stay in that facility was inappropriate. The Court held that the decisions of the utilization review committee were private judgments based on professional standards. The regulations required the process but did not dictate the decision to discharge or transfer in any particular case.

This bill does not compel the broadcasters to agree on or to implement anything. It certainly encourages them to do something, but in the context of *Flagg Bros.* and *Yaretsky,* it is difficult to see how the encouragement is more of a force, is more significant, than the encouragement found insufficient in those cases. The broadcasters in the absence of the antitrust laws could have come together without legal worry; just as in *Flagg Bros.*, the exemption relieves them of the legal consequences that might otherwise be visited upon them for taking the action they may take. *Yaretsky* involved, in fact, the imposition of the process which inexorably led to some

discharges and transfers, if it did not, in fact, mandate the particular transfers being complained of.

It may be suggested that because expression is involved some relaxation of state action standards may occur. It is true that in First Amendment cases the Court often permits challenges to be adjudicated that in other kinds of cases it would not allow, such as relaxed justiciability standards (standard and the like). The case law does not permit an evaluation of this possibility, but see *CBS* v. *DNC, supra,* and it cannot be ruled out. It may also be suggested that the legislative history of this bill, to date and perhaps all through its course through the legislative process, demonstrates a clear and urgent wish that the broadcasters do precisely what is likely to be the result of the exemption, thus satisfying the compulsion standard. It is true that in *Flagg Bros.* the State was no doubt indifferent whether any warehousemen's liens were executed; the authorization was a general one. The same thing may not be said of *Yaretsky,* in which the result was certainly the one desired by the promulgators of the federal regulations.

Whether there would be sufficient "state action" found so that the broadcasters' rules would be tested under the First Amendment is unclear, but the precedents indicate that a strong case exists for arguing that the rules would be deemed merely private action.

II

If the broadcasters' rules and implementing actions were to be judged by First Amendment standards because the relationship with the congressional action was judged sufficiently close, could limitations on expression to inhibit telecast violence be sustained. In the first place, in the absence of any such rules and any indication of their administration, it is not possible to address the question with any sort of specificity. At most, we can suggest what the standards of adjudication would be.

The broadcasting industry operates under restraint not imposed upon other media. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *CBS* v. *DNC,* supra; *CBS* v. *FCC,* 453 U.S. 367 (1981). The prevailing rationale for this different treatment is one of spectrum scarcity, that there is only so much broadcasting that can occur without chaos, so government must allocate to licensees who must serve the public interest while in possession of the license. Therefore, they can be restrained and regulated to a much greater degree than other "speakers." The Court has indicated that while it has doubts about the continuing validity of this rationale, it will not reconsider the longstanding approach without some signal from Congress or the FCC that the technology has gone beyond the rationale. *FCC* v. *League of Women Voters,* 468 U.S. 364, 376 n. 11 (1984).

But while governmental power is broad, the First Amendment still applies and the degree of federal regulation is limited. Congress' restrictions—or those restrictions attributable to Congress through the state action doctrine—must be narrowly tailored to further a substantial governmental interest. *FCC* v. *League of Women Voters,* supra, 380. Thus, a ban on editoralizing by noncom-

mercial educational stations receiving federal funds was found to strike at the heart of the form of speech protected by the First Amendment and too overbroadly sought to further the governmental interest.

Broadcast restrictions on the depictions of violence, therefore, would have to meet this standard. In *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978), the Court sustained FCC action in penalizing a station for broadcasting "indecent language during the afternoon. The governmental interest was in protecting children and also adult listeners who might be offended. The governmental interest was sufficiently substantial to outweigh the broadcaster's First Amendment interest in controlling the presentation of its programming. The same governmental interest has been held to extend to protecting children from speech that might not be legally obscene in the context of adults. *New York* v. *Ferber,* 458 U.S. 747 (1982); *Ginsberg* v. *New York,* 390 U.S. 629 (1968).

A constitutional defense of any antiviolence rules, therefore, would require development of evidence with respect to the effect upon children of exposure to depictions of violence. If it could be established that there is adverse effect, a governmental interest could be defined. Thereafter, the rules would have to be evaluated in order to determine if they are narrowly tailored and do not infringe too severely upon First Amendment interests. A case for or against such rules could not at this point be essayed, but it can be said that the case law does not foreclose the argument to be made that rules appropriately tailored would be sustained.

To the extent that the bill would apply to the cable industry, it should be noted that a number of lower federal courts take the position that the same scarcity rationale is inapplicable and that, because of the degree of adult viewer control of cable reception, the industry is entitled to much greater First Amendment protection than broadcasting generally. E.g., *Quincy Cable TV* v. *FCC,* 768 F.2d 1434 (C.A.D.C. 1985), cert. den., 106 S. Ct. (1968) (85–502, June 9, 1986); *Cruz* v. *Ferre,* 755 F.2d 1415 (C.A. 11, 1985). Beyond noting that cable television is entitled to some degree of First Amendment protection, the Supreme Court has not yet undertaken a resolution of this issue. *City of Los Angeles* v. *Preferred Communications,* 106 S. Ct. 2034, 2037 (1986).

JOHNNY H. KILLIAN,
Senior Specialist in American Constitutional Law,
American Law Division.

CONCORD, MA, *August 16, 1986.*

Hon. PAUL SIMON,
U.S. Senate,
Washington, DC.

DEAR SENATOR SIMON: Reference is had to your inquiry of August 9th whether S. 2332 is constitutional. Section 2 provides that the antitrust laws "shall not apply" in certain circumstances. The enactment of those laws was within Congress' discretion, and it remains free to repeal them in whole or in part. The exemption afforded by the Bill may be viewed as a pro tanto repeal.

Although I do not pretend to be well-versed in the niceties of the First Amendment, I do not perceive how Congress "abridges" freedom of speech by removing an antitrust barrier. The Bill does not compel action; it simply removes sanctions against particular actions. Newspapers and broadcasters are presently free to decline to publish certain views. There would be no violation of the First Amendment were an individual broadcaster to decline to air violence. No more should an agreement among several broadcaster to eschew the showing of violence, exempted by Congress from the antitrust laws, violate the First Amendment. The Amendment does not shield one who cries "Fire" in a crowded theatre. It is not far fetched to analogize incessant incitement to violence, given the spreading epidemic in our nation. If any abridgment of free speech occurs, it will be by private action, not by Congress. It is Congress that is forbidden to "abridge" free speech.

Congress, I consider, is amply justified in assuming the constitutionality of the Bill, leaving to the courts ultimate decision. A contrary assumption would bar the door to a bona fide attempt to deal with an acknowledged evil.

Very truly yours,

RAOUL BERGER.

CHICAGO, IL, *August 22, 1986.*

Hon. PAUL SIMON,
U.S. Senate,
Washington, DC.

DEAR PAUL: I have your letter and enclosures of August 9. Almost every moment since their receipt I have been at the bedside of my brother, who has suffered a heart attack. He is beginning to mend a bit, so that I can relax somewhat.

I share the views of Newton Minow with respect to your bill granting limited antitrust exemption to those voluntarily working together to address the negative effects to television violence. Without such cooperation I fear that a sort of Gresham's Law will force each of them to promote violence on their programs, lest the competition win larger audiences. I believe that the exemption is both constitutional and wise in that it is in the national interest and does not curb business competition. It is tantamount a program that would curtail drug or drink abuse or encourage the rehabilitation of offenders. It is not grounded in such dangerous purposes that have historically and legally brought about anti-trust legislation. As it will be a voluntary program that it will encourage, there is no danger of censorship or other violation of freedom of expression. It will carry no penalty direct or indirect for those who choose not to abide by any arrangements that may be made.

I want to comment you for your leadership in this, as well as other areas. You do not hesitate to speak out or take action where such is required.

Long may you serve the people of this State and nation.

Cordially,

ELMER GERTZ, *Attorney at Law.*

YALE LAW SCHOOL,
New Haven, CT, September 2, 1986.

Hon. PAUL SIMON,
U.S. Senate,
Washington, DC.

DEAR SENATOR SIMON: You have asked for my views on whether the revised S. 2323 is consistent with the First Amendment to the Constitution. In my judgment, the revised bill is clearly constitutional.

The bill would grant a limited antitrust exemption to a range of broadcasting entities, allowing them to discuss and potentially develop voluntary guidelines to address the negative effects of televised violence. The bill itself does not establish or require the establishment of any guidelines. By granting an exemption to the antitrust laws, it simply removes a statutory obstacle that currently may stand in the way of certain private conduct. It creates a legal situation in which Congress neither requires nor prohibits voluntary guidelines.

This resulting legal situation—in which no Congressional law would either require or prohibit broadcast guidelines—seems fully consistent with the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech." To say that the First Amendment prohibits Congress from establishing this exemption to the federal antitrust laws would mean that the antitrust laws are constitutionally required. That is an altogether implausible position.

Sincerely,

PAUL GEWIRTZ, *Professor of Law.*

JONES, DAY, REAVIS & POGUE,
Washington, DC, August 12, 1986.

Re S. 2323.

Hon. PAUL SIMON,
Senate Office Building,
Washington, DC.

DEAR SENATOR SIMON: I am writing in reply to your letter of August 9th relating to this bill. I have read the bill with much interest, and I am much impressed by Mr. Minow's statement in support of it.

As far as the general purpose of the bill is concerned, I think it is highly desirable. There are some situations where the antitrust laws lead to competition which is highly undesirable in the overall public interest. The question of violence on television seems to me to fall in this category.

(Another area where competition is, I think, doing a great harm is with respect to the employment of young lawyers out of law school. The salaries now being paid seem to me to be unwise, and, indeed, immoral. Among other things, they have a very disruptive effect on students in law schools. They say: "Why should I spend my time here, when I am worth so much already." Because of the antitrust laws, however, there does not seem to be anything that can be done about it.)

As for the bill itself, I find myself with some concern about the generality of the language in paragraph (b)(2). For example, is it entirely clear that all networks or entities have a person who is designated as "chief executive officer." That has become a popular term in recent years, but sometimes they are content with being called "chairman" or "president."

And then I am a little concerned about the phrase "or their designee," at the end of the sentence. This, in effect, gives a sort of presidential pardoning power to the individuals who make the designation. Ordinarily, such "pardons" are given by some kind of public authority, as, for example, the Civil Aeronautics Board, when it existed, and the Department of Transportation now. In any event, should it not be made clear that the designation must be made in advance, and prior to any discussion or agreement?

Moreover, I am a bit troubled by the open-ended nature of the provision. Apparently it goes on indefinitely, and would apply to many things other than discussions and meetings.

Would it not be possible to handle this by providing that the Federal Communications Commission could authorize meetings for the purpose of discussing these matters, and reaching agreements about them? It might also be possible to have the FCC designate the persons to attend such meetings, either by name or by category. It could then be provided that all discussions, and any agreements reached at meetings so authorized by the FCC, would be exempt from the antitrust laws.

The analogy I have in mind is the provision under which agreements are reached with respect to international air fares. I have not undertaken to look up the exact text of the provision on that matter, but it might provide something of a guide here.

As for the question of constitutionality, I have no doubt that the basic provision would be constitutional. Here again, the long-existing provision with respect to air fares would seem to provide an analogy.

I hope that these observations are of some use to you.

With best wishes,

Very truly yours,

ERWIN N. GRISWOLD.

THE UNIVERSITY OF CHICAGO,
Chicago, IL, September 2, 1986.

Senator PAUL SIMON,
U.S. Senate,
Washington, DC.

DEAR SENATOR: I am sorry to be late in responding to your request for my opinion about your proposed S. 2323 affording an antitrust exemption to the television networks to permit them to engage in joint efforts to diminish violence on television.

I have no question about the constitutional validity of the bill as proposed. I have some doubts as to its necessity. I do not think that there is great danger of antitrust litigation that would result from the working out an ethical code for TV production. I have some qualms that the law could be used to cover up what would other-

wise be antitrust violations if the action is taken under the guise of reducing violence on TV.

Again, I have no concern that voluntary action by TV stations or networks inhibiting productions containing violence would fall afoul of the First Amendment. Network action is not yet government action. But again, I should have some concern about what implicit authority the FCC might derive from the law, either to limit licenses or impose standards. That would be government action and would probably be in violation of the First Amendment.

It might be necessary to make it specific that your proposed law covers cable TV to the same degree as network TV in light of the stance taken in Congress and the administration by some that, somehow or another, cable TV falls outside the full protection of the First Amendment.

If I can be of help, I shall try to do so.

With all good wishes,

As always,

PHILIP B. KURLAND.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, IL, August 22, 1986.

Senator PAUL SIMON,
U.S. Senate,
Washington, DC.

DEAR SENATOR SIMON: You have requested my views on the constitutionality of S. 2323. I should state at the outset that I do not agree that the "evidence supporting the existence of the problem is overwhelming." Although the National Institute of Mental Health, the American Academy of Pediatrics, and the Surgeon General "have all found that televised violence can have harmful effects on both children and adults," the critical issue in deciding whether there is even a "problem" is not whether televised violence "can have harmful effects," but whether such expression invariably has such "effects," what we mean by "harmful," how severe these "effects" really are, whether there are ways to mitigate the "harmful effects" without eliminating the expression, and whether the "harmful effects" really outweigh the "beneficial effects" of the speech.

Almost all expression can be said to have "harmful" effects, depending on the definition of "harm." And historically the greatest danger to free expression has been a focus on the "harmful" rather than the "beneficial" effects of speech. As illustrated by the recent report of the Attorney General's Commission on Pornography, these are complex and difficult issues. One should not begin the inquiry with the assumption that the "evidence supporting the existence of the problem is overwhelming."

This, then, brings me to the constitutional issue. As both you and Mr. Minnow recognize, any effort of government to proscribe televised violence directly would pose severe first amendment difficulties. As you also recognize, however, an entirely private agreement among broadcasters not to televise violence would pose no such dif-

ficulties, at least insofar as participation in the agreement is wholly voluntary and not in any way the product of governmental coercion. With these principles in mind, S. 2323 creates an antitrust exemption to enable private parties to develop "voluntary guidelines designed to alleviate the negative impact of violence in telecast material."

Since private could clearly adopt such guidelines without running afoul of the first amendment, why might S. 2323 pose a different question? There are at least two reasons.

First, broadcasters are not purely private parties. They hold special licenses to operate the "government-owned" airwaves subject to extensive government regulation. Although such factors may not be sufficient to make actions by individual broadcasters "government action" for purposes of the Constitution, cf. *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973), a concerted decision by broadcasters acting as a group may sufficiently replicate the dangers of governmental power in this context to trigger constitutional limitations. Of course, this view, if meritorious, would not invalidate S. 2323. Rather, it would come into play only after the broadcasters had actually promulgated the proposed "guidelines."

Second, the very fact of the exemption creates possible first amendment problems. To make the point more clearly, suppose Congress enacts legislation declaring the antitrust laws inapplicable to action "among persons in the televison industry pursuant to the development and dissemination of voluntary guidelines designed to alleviate the negative impact of unpatriotic expression in telecast material." Such legislation duplicates S. 2323 in form, but clearly poses serious first amendment issues because it exempts from a law of otherwise general application private agreements designed to disadvantage only a particular set of messages. In the absence of an antitrust law, broadcasters might be able to adopt such an agreement free of constitutional constraint. But once the antitrust law enters the picture, and government creates an exemption designed to enable private parties to restrict only a particular set of messages, serious first amendment issues emerge. Thus, the form of S. 2323—enabling broadcasters to adopt voluntary guidelines, rather than imposing restrictions directly by legislation—does not eliminate the first amendment concerns. The problem, in other words, is that my hypothetical variant on S. 2323 exempts broadcasters from the antitrust laws if they wish to adopt voluntary guidelines to restrict unpatriotic expression, but not if they wish to restrict other forms of expression. Such legislation both disadvantages unpatriotic expression and advantages other expression. It would be clearly unconstitutional.

Is S. 2323 distinguishable? In *Regan* v. *Taxation With Representation,* 461 U.S. 540 (1983), the Supreme Court upheld a federal statute providing that contributions to an otherwise tax exempt organization, other than a tax-exempt veterans' organization, are not tax deductible if a substantial part of the organization's activities consists of attempts to influence legislation. The Court explained that "Congress is not required by the first amendment to subsidize lobbying" and that Congress may selectively subsidize lobbying so long as its does not "discriminate invidiously in its subsidies in

such a way as to ' "aim at the suppression of dangerous ideas." ' " Similarly, one might argue that Congress is not required by the first amendment to exempt agreements among broadcasters from the antitrust laws and that S. 2323 is aimed not "at the suppression of dangerous ideas," but at material that is dangerous because of the manner in which it depicts events. This is at least a plausible argument. Cf. Stone "Content Regulation and the First Amendment," 25 Wm. & Mary L. Rev. 189, 239–251 (1983).

The above thoughts are obviously only tentative. It is clear to me, however, that what may seem at first glance to be constitutionally unproblematic, may be problematic indeed. I have no firm view, however, as to the ultimate issue. If you would like to pursue these matters further, please feel free to call on me at any time.

Sincerely yours.

GEOFFREY R. STONE,
Harry Kalven, Jr. Professor of Law.

SOUTHERN ILLINOIS UNIVERSITY AT CARBONDALE,
SCHOOL OF LAW,
Carbondale, IL, September 3, 1986.

Senator PAUL SIMON,
Senate Judiciary Committee,
Washington, DC.

Attention Chris Dunn, Council

DEAR SENATOR SIMON: Thank you for your good note regarding Senate Bill 2323 which would grant a limited antitrust exemption to the major television networks, representatives of industry trade associations and producers of programming to discuss and potentially develop voluntary guidelines to address the negative effects of televised violence. I am indeed pleased and flattered you asked me about my opinion on this question.

I share the concern of the members of the committee with the serious problem of violence and the possible harms of violence on both children and adults. I am fearful, however, that once one begins the process of censoring violence, no matter how well motivated the effort at censorship, it cannot help but lead inevitably to additional censorships. Therefore, I find a voluntary approach to this question a far more important and significant way to approach the problem. You are correct in perceiving that there would be serious First Amendment questions associated with an effort to adopt a congressionally mandated limitation on television violence. However, I see the adoption of programming guidelines which are voluntary as a different matter.

As you know, the antitrust restrictions are not a constitutionally mandated restriction on conduct, but grow out of a public policy consideration designed to promote competition. I do not believe that the creation of exemptions within antitrust law raises constitutional questions. I would favor the adoption of Senate Bill 2323 as a moderate approach to what is a very serious public question. Whether or not I would favor a specific set of guidelines which might raise constitutional issues is another which need not be addressed at this time.

Again, I hope that this will be of some help, and I am delighted to have had the opportunity to respond. I took the liberty of discussing this with Dean Keith Sanders of our College of Communications & Fine Arts and I believe he shares my sense with regard to the legislation.

Sincerely yours,

RENNARD STRICKLAND,
Dean and Professor.

HARVARD UNIVERSITY LAW SCHOOL,
Cambridge, MA, August 25, 1986.

Hon. PAUL SIMON,
U.S. Senate,
Washington, DC.

DEAR PAUL: I have received your letter of August 9, 1986, and the accompanying materials on S. 2323. After an initial review of the subject, I believe the courts will probably uphold the antitrust exemption, but the proposal does raise first amendment questions of a potentially troublesome sort.

On its face, S. 2323 might seem to create no problem. Most importantly, the law is not aimed at suppressing, censoring, or even regulating any particular viewpoint. Television violence, whatever "view" it is used to advance on any given occasion, is a serious national issue, and the government should be able to address it.

Concerns arise, however, once one considers the precedent set by carving out exemptions from regulatory schemes calculated to induce broadcasters or others to shape their messages along lines favored, however reasonably, by those in power. For example, what if S. 2323 granted the networks an exemption "pursuant to the development of voluntary guidelines designed to promote the United States government," or "to promote the Republican Party," or "to advance the rights of the unborn"? Clearly, such exemptions would pose the gravest first amendment problems inasmuch as they could be deemed to provide selective stimuli to the dissemination of particular viewpoints.

What, then, is the difference between my examples and S. 2323? First, the concept of television violence may be so far outside the areas of greatest first amendment concern that a court simply might not worry about the resulting government-induced pressure to refrain from such "speech." Second, the Supreme Court has long allowed a larger governmental role in channeling television than in shaping newspapers and other print media. Cases like *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), which upheld the fairness doctrine, and *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), which allowed television stations, acting with FCC authorization, to refuse to sell time for advertisements about controversial subjects, could certainly be cited in support of S. 2323. These decisions, however, were based on certain attitudes towards television—that the broadcast spectrum is finite and that the government must play an active regulatory role—that a future Supreme Court might not share.

Perhaps the strongest defense of S. 2323 against a first amendment attack on its selective focus is the fact that the voluntary guidelines whose joint development and private acceptance S. 2323 would exempt from the antitrust laws are "guidelines designed to alleviate the negative impact of violence" on television—not guidelines necessarily designed to alter violent content as such. The focus on "impact" suggests, for example, voluntary agreements about when to air especially gory episodes so as to minimize exposure to impressionable children. to the degree Congress is not actively encouraging content-based self-censorship, S. 2323 becomes easier to defend.

Thank you for seeking me out on this question; don't hesitate to call me to discuss it further.

Sincerely,

LAURENCE TRIBE,
Tyler Professor of Constitutional Law.

P.S. I have sent a nearly identical letter to Ted Kennedy in response to his inquiry on this subject.

NORMAL, IL, *August 20, 1986.*

Senator PAUL SIMON,
Senate Office Building,
Washington, DC.

DEAR SENATOR SIMON: Your August 9 letter arrived several days ago, and I apologize for the delay in responding. I offer in mitigation the fact that I was on vacation when it came, and have not yet returned to the office. Consequently, my opinion will not be bolstered by the usual citations of authority, but I have no less confidence in it.

You've asked by opinion regarding the constitutionality of a proposed amendment to S. 2323 which would exempt from the application of the Federal anti-trust laws discussions or actions by television industry personnel in the "development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in telecast material". There is, in my judgment, no substantial First Amendment problem with this amendment assumig that evidence relating to the negative impact is as conclusive as you indicate.

As you know, First Amendment rights are not absolute, and determining the constitutional permissibility of a given limitation involves a sort of weighing process in which the necessity for and desirability of the restriction must be measured against its inhibiting effects. Certainly the value, if any, of televised violence is minimal, and the negative impact upon juveniles and those adults of lesser intellects seems to have been adequately demonstrated. I am not aware of studies which "conclusively" demonstrate that televised violence has an equal negative impact upon adults with normal mental powers, but you appear to be convinced that this is true. Even it this were to be debatable, it would seem to me that the demonstrable negative impact upon children and some adults would be sufficient to sustain the amendment against a First Amendment

challenge in view of the voluntary nature of the guidelines, and their salutary purpose.

I hope these comments will be of some help, and I wish you well in your efforts to alleviate what I agree is a very real problem.

Sincerely yours,

ROBERT C. UNDERWOOD.

IV. COMMITTEE ACTION

The Committee conducted hearings on S. 2323 on June 20, 1986. As amended, S. 2323 was reported out of the Committee on September 18, 1986, by unanimous voice vote.

Prior to final passage, Senator Simon offered the following amendment in the nature of a substitute to S. 2323:

This Simon amendment was adopted by a voice vote. S. 2323 as amended by the Simon amendment in the nature of a substitute was reported favorably by a voice vote.

V. SECTION-BY-SECTION ANALYSIS

A. Section 1: Grant of exemption and definitions

Section 1(a): This section exempts the activities set out in Section 2 from certain provisions of the antitrust laws.

Section 1(b)(1): This section defines "antitrust laws" using definitions contained in the Clayton Act and Federal Trade Commission Act.

Section 1(b)(2): This section defines the term "person in the television industry." It designates the parties who will be granted the exemption.

The "chief executive officer of a television network" means the chief operating officer of a network. The term "network" is defined in the Code of Federal Regulations. (1986).

The term "entity which produces programming for television distribution, including theatrical motion pictures" is intended by the Committee to be construed broadly to include corporations, partnerships, or sole proprietorships engaged in the production of any type of programming for television.

The term "designees" means one or more persons designated by the presidents of the industry trade associations and the other persons in the television industry named in the bill. While the Committee chose not to limit the number of persons who may be chosen by the parties covered by the exemption as their designees, it intends that the number of designees be the minimum number reasonably necessary to carry out the activities authorized by the exemption granted by this legislation.

The term "telecast" means any program broadcast by a television broadcast station or transmitted by a cable system.

B. Section 2: Definition of activity authorized by the exemption

The antitrust laws shall not apply to any joint discussion, consideration, review, action or agreement by or among persons in the television industry pursuant to the development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

The Committee intends that the parties covered by the exemption be able to undertake all activities necessary to accomplish the "development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in telecast material." This would include the distribution or publication of such voluntary guidelines.

C. Section 3: Boycotts not exempt; three year sunset provision

Section 3(a): This section is similar to language in other federal statutes granting antitrust exemptions but which exclude joint activity which results in boycott. See, e.g., McCarran-Ferguson Act, 15 U.S.C. Section 1011, 10139(b). The term "any other person in such industry" is intended by the Committee to be given a broad construction. It includes any person in the televison industry, not solely those who are included in the exemption.

Section 3(b): This section provides that the exemption granted by this legislation will terminate three years from the date of enactment.

VI. EXECUTIVE COMMUNICATION

By letters dated September 26, 1986, from Honorable Edwin Meese III, Attorney General, and July 15, 1986, from John R. Bolton, Assistant Attorney General, the United States Department of Justice expressed its views of S. 2323 to the Committee:

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, September 25, 1986.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: You have asked for the views of the Department of Justice on the amended version of S. 2323, a bill "to exempt certain activities from provisions of the antitrust laws," which has been reported by the Committee on the Judiciary. For a 36-month period beginning with its enactment, the bill would exempt from the antitrust laws certain agreements among members of the television industry that relate to voluntary guidelines designed to alleviate the effects of violence in telecast material. Our comments on an earlier version of the bill, contained in the Department's letter to you of July 15, raised certain questions. The revised version of the bill responds to our earlier comments.

As you know, the Department generally opposes special exemptions to the antitrust laws, which tend to transform antitrust from a set of neutral, pro-competitive ground rules into special-interest legislation. Accordingly, we are also of the view that exemptions, when granted, should be precisely defined and narrow in scope, and that their justification should be strong. As to the latter consideration, while the Department of Justice has not had the occasion to consider television violence in any detail, it appears to us that the issue is one of national importance. For this reason, we believe that this bill responds to genuinely exceptional circum-

stances. We are also pleased by the fact that the bill is limited in time.

Moreover, the bill as reported by the Committee is significantly improved in scope and content. Its exemption now extends to producers of television programming, and the type of conduct it protects has been defined more clearly: that related to "voluntary guidelines to alleviate the negative impact of violence in telecast material." As we understand it, these guidelines would refer to programming content and could require changes in telecast depictions and treatment of violence, including warnings and other additional statements, such as comments and education. Presumably, they also could address program format and time of presentation.

It is also apparent that the guidelines referred to are to be truly voluntary and not an anti-competitive tool. Since the guidelines protected are to deal with violence on television, they would not be protected to the extent that they were designed with an eye toward reduction of competition or of consumer welfare. Moreover, the exclusion of boycotts from the exemption shows that coercive methods are not contemplated.

In short, the new bill is a narrowly-drawn exemption designed to deal with a major issue that is itself largely unconnected to the proper functioning of an unregulated and competitive economy. Accordingly, I am happy to report that the Department supports the goals of the bill—responsible, private, voluntary measures to deal with television violence—and has no objection to it from the point of view of antitrust policy.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the President's program.

Sincerely,

EDWIN MEESE III, *Attorney General.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, July 15, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter is in response to your request for the views of the Department of Justice on S. 2323, a bill "to exempt certain activities from provisions of the antitrust laws." This bill would exempt from the antitrust laws agreements or joint action among certain members of the television broadcasting industry if the purpose of the agreement or action is to determine or alleviate the negative impact of violence in television broadcast material and if the agreement or action is not intended to result in a boycott. It is the Department's understanding that this legislation is intended to permit the television broadcasting industry to control excessive violence on television through self-regulation without incurring antitrust liability. While the Department fully appreciates the issues raised by excessive or gratuitous violence on televi-

sion that underlie this legislation, the broad antitrust exemption it would confer gives us substantial concern.

S. 2323 would encourage collective, self-regulation of violence by the over-the-air and cable TV industries by removing what apparently is perceived to be a threat to such regulation—potential antitrust liability. The history of the application of the antitrust laws to self-regulatory codes in television or similar entertainment industries is relatively sparse. Some cases suggest that industry code provisions promulgated in the public interest and without anticompetitive purposes would not violate the antitrust laws.[1] On the other hand, self-regulatory code provisions with demonstrable anticompetitive effects can have antitrust consequences.[2] Moreover, any benefits not related to competition (such as the reduction in the level of violence) that might be generated by such provisions would not be cognizable under the antitrust laws and thus would not provide legal justification for otherwise anticompetitive provisions of a self-regulatory code.[3] Thus, an antitrust immunity might be necessary only if Congress determines that excessive television violence may be controlled by encouraging the development of self-regulatory solutions.

Without taking a position as to the wisdom of S. 2323's approach to the problem of television violence, the Department believes that the bill's antitrust immunity is broader and more vague than necessary to accomplish the bill's stated objectives. It is difficult to assess whether the conduct covered by S. 2323 would raise serious competitive concerns or risk liability under the antitrust laws because of the breadth of the bill and the ambiguity inherent in it. For example, the bill's basic exemption applies to agreements or joint action "in reviewing, considering, evaluating, or taking action with respect to any television broadcast or any material intended for any television broadcast if the purpose of such agreement or action is to determine or alleviate the negative impact, if any, of violence in such television broadcast material." This language could cover an extremely broad range of possible activities, including, for example: studies of the effects of television violence,[4] rating system similar to that employed by the motion picture industry, time-of-broadcast restrictions, viewer warnings, general or specific rules regarding the degree or manner in which violence is depicted, allocation of material containing violence between over-the-air stations and cable systems, or censorship of individual programs. It could cover rules that were binding and somehow enforceable as well as advisory provisions leaving program content to the discretion of individual television stations and cable systems.

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[1] See, e.g., American Federation of Television and Radio Artists v. National Association of Broadcasters, 407 F.Supp. 900 (S.D.N.Y. 1976) (NAB rule preventing hosts of children's programs from delivering commercial messages on or adjacent to those programs; court found the rule had no anticompetitive purpose and was in the public interest—not a violation of the antitrust laws); American Brands, Inc. v. National Association of Broadcasters, 308 F.Supp. 1166 (D.D.C. 1969) (NAB Code required disclosure of relevant information in cigarette ads; preliminary injunction denied—court stated that the standards of the Code served the public interest).

[2] See, e.g., United States v. National Association of Broadcasters, 536 F.Supp. 149 (D.D.C. 1982) (Government antitrust challenge to NAB Code provisions governing length, number, and spacing of commercials resolved by consent decree barring such provisions).

[3] National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

[4] S. 2322, introduced on the same day as S. 2323, calls for such a study by the Federal Communications Commission.

Additional uncertainty as to what conduct would be exempted by the bill is created by section 3, which excludes from the bill's exemption joint agreements, understandings or actions which are "intended to result in a boycott of any other person in the industry.

The language of the bill also raises questions regarding who may participate in collective action that is to be immune from the antitrust laws, and against whom boycotts will not be protected. The bill exempts agreements and joint action among "persons in the television broadcasting industry." It also withholds the exemption for boycotts of such persons. "Person in the television broadcasting industry" is defined to include only representatives of the television networks, The National Cable Television Association and the Association of Independent Television Stations. It does not include other key participants in television programming, such as television and motion picture production companies, cable programmers, and to some extent, television advertisers. The effect of the bill on participation by, or a boycott of, such entities in an effort to alleviate the impact of television violence is thus most unclear.

In short, S. 2323 would exempt from the antitrust laws broad, yet somehow limited collective decisionmaking and action among certain segments of the television broadcasting industry intended to address the public policy issues raised by TV violence. Where Congress has granted antitrust immunities, however, it has been careful to delimit with some precision the activities it wishes to protect. Thus, should the Committee conclude that collective activity protected by antitrust immunity is an appropriate way to address TV violence, the Department believes the Committee should determine the specifics of a reasonable approach, as to both content and participation, and draft legislation that accurately conveys the immunity intended.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee has concluded that the Act will have no direct regulatory impact.

VIII. ESTIMATED COST OF LEGISLATION

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 25, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2323, a bill to exempt certain activities from provisions of the antitrust laws, as ordered reported by the Senate Committee on the Judiciary on September 19, 1986.

We estimate that enactment of this legislation would result in no cost to the federal government or to state or local governments. S. 2323 would enable the chief executive officers of television networks and of entities that produce television programming, and executives of certain organizations associated with the television industry, to meet and consider establishing guidelines restricting the level of violence on television without being subject to antitrust laws.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

JAMES BLUM,
(For Rudolph G. Penner, Director).

IX. ADDITIONAL VIEWS OF SENATOR MATHIAS

At first glance, S. 2323 appears to be a modest response to a difficult problem. But closer examination suggests that its impact on important First Amendment values could be more significant than first appears.

S. 2323 would exempt from the antitrust laws joint action with respect to "the development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in telecast material." By its terms, it does not require the affected parties covered by the exemption to draft guidelines; indeed, it does not even explicitly invite or suggest that they do so. It merely permits them to do so. Furthermore, it does not require any participant to adhere to the guidelines that might result.

But the full impact of this legislation may not be limited by the four corners of its text. No matter how "voluntary" the guidelines might appear to be, the premise of their adoption must be to supplant the judgment of individual broadcasters. If legislative action results in any coercive effect on those who produce or broadcast television programs, then a substantial First Amendment issue may be presented. And whatever effect this bill may have on the antitrust laws, Congress has no powers to exempt anyone from the strictures of the First Amendment.

The target of this legislation is televised violence. The impact of television on behavior is still a matter of great dispute among researchers. The majority report cites studies that suggest a link between television viewing and violent behavior; it overlooks the fact that other studies suggest there is little or no connection. If the nexus between speech protected by the First Amendment and socially undesirable behavior is not completely clear, then Congress ought to resist the temptation to influence speech. As Professor Geoffrey Stone pointed out in his letter of August 22, 1986 to Senator Simon,

> Almost all expressions can be said to have "harmful" effects, depending on the definition of "harm." And historically the greatest danger to free expression had been a focus on the "harmful" rather than the beneficial effects of speech.

Finally, although the sponsors of this legislation have demonstrated a sensitivity to the First Amendment concerns raised by this legislation, I cannot agree that this crucial aspect of the question has been adequately investigated. I commend Senator Simon for seeking the views of several constitutional scholars, and I appreciate the cooperativeness of those professors who took the time to give us their first impressions of this legislation. But the effect of S. 2323 on free speech is too important to relegate to a brief ex-

change of correspondence. It deserves to be explored in detail at a hearing.

This year's concern is television violence. But if we bend the law to accommodate this concern, next year there will be another, and the following year still another. I do not minimize the importance of this issue. The pervasiveness of violence on our TV screens is troubling to many thoughtful observers, and alarming to many parents. But even speech that troubles and alarms is protected by the First Amendment. If Congress acts to interfere with it, or even to countenance interference with it by private parties acting under governmental imprimatur, it must act only with the utmost circumspection, and only on a full record of the need for action.

CHARLES MCC. MATHIAS, JR.

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